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Submission re Office of the Data Protection Commissioner and FOI Legislation

1. Introduction

Both the Department of Justice and Equality and the Office of the Data Protection Commissioner (ODPC) have examined the Freedom and Information Bill 2013, as amended at Committee Stage. The consistent position of both bodies has been fully supportive of FOI being extended to the administration and publicity/information files of the ODPC. However, for the reasons set out below, and notwithstanding the welcome and helpful amendment by DPER to the current draft [section 41 (1)] of the Bill, it is the considered view of the Department and the Data Protection Commissioner (DPC) that a block exemption for the investigation, audit and complaints files of the ODPC as well as advice given and sought in confidence should be available. A case in support of this position is set out below.

2. The Complaints' resolution role of the Office of the Data Protection Commissioner is directly analogous to that of the Ombudsman Offices

Schedule 1, Part 1, exclusions for Ombudsman type bodies

Schedule 1, Part 1 of the draft FOI bill includes Ombudsmen-type Offices in the Schedule of "Partially Included Agencies" as follows:

- (p) the Garda Síochána Ombudsman Commission
- (q) the Ombudsman
- (r) the Ombudsman for Children
- (s) the Ombudsman for Financial Services
- (t) the Legal Services Ombudsman
- (u) the Ombudsman for Defence Forces
- (v) the Pensions Ombudsman

The various Ombudsmen Offices have block exemptions for their investigative files, generally "insofar as it relates to records concerning an examination or investigation." In addition, the Central Bank of Ireland, which is subject to a similar confidentiality requirement as the ODPC, is included under (b) of Schedule 1 as a partially exempt agency.

The rationale for not incorporating the ODPC in Schedule 1, Part 1, is contained in the response by the Minister for PER in the July 2012 FOI Government memorandum (see 14.3.3) wherein it is stated:

"The Minister does not consider the functions of the **Data Protection Commissioner** to be analogous to those of an Ombudsman and proposes to bring this body under the Freedom of

Information Act in full other than investigative records which are prohibited from release under EU law.”

Both the Department and the ODPC respectfully submit that there are sound public policy reasons to justify the alteration of this position.

Rationale for treating the ODPC as an Ombudsman Type Body

It is strongly contended that the ODPC is, in fact, an Ombudsman type body and should be treated as such under the draft legislation. Under section 10(1)(b) (ii) (extract appended at A) of the Data Protection Acts 1998 and 2003, the Data Protection Commissioner has a statutory obligation to attempt to reach an “amicable resolution” with regard to complaints, a situation directly analogous with the Ombudsman role. The ODPC legislation provides that they proceed to a formal decision in relation to a complaint, only after being unable to arrange an amicable resolution within a reasonable time.

This role involves the ODPC acting as a go-between Ombudsman between the parties, using informal procedures, rather than as a tribunal. The overwhelming majority of complaints received by the ODPC are resolved by amicable resolution. A total of **1290** investigations of complaints were concluded by the ODPC in 2013. Only **29 formal decisions** were made by the Commissioner. This modus operandi is typical of other Ombudsman type bodies.

The current “informal” approach would be greatly inhibited by making these files potentially subject to public disclosure, requiring the ODPC instead to act like a tribunal with full disclosure of all documents to both parties. It is reasonable to presume that consideration of this potentially inhibiting effect is one reason why the investigation files of all ombudsman-type bodies have benefitted from a block exemption.

Section 5(1)(gg) of the Data Protection Act 1988 (as inserted by section 6 of the Data Protection (Amendment) Act 2003) provides that the access right under section 4 of the 1988 Act (i.e. the individual's right to access his or her data) does not apply to personal data “kept by the Commissioner (i.e. Data Protection Commissioner) or the Information Commissioner for the purposes of his or her functions” (see **Appendix A**). This means, for example, that an investigation being carried out by either Commissioner cannot be interrupted or frustrated by an individual whose actions might be under investigation making access requests under data protection law. It would be strange indeed if such an obstacle would now be created through access rights under revised FOI legislation. However, this is precisely what is being unintentionally created as the draft legislation essentially requires that the DPC must firstly apply the FOI legislation in order to claim the protection of the law in respect of its investigation and audit files. Any decision is appealable to the Office of the Information Commissioner (OIC). Hence, it is perfectly feasible to imagine a situation where attempts may be made to frustrate ongoing investigation and audits by the making of routine requests which require the application of the FOI legislation. This would be enormously disruptive to the ODPC and is inherently undesirable.

Furthermore, in circumstances where the ODPC is, in addition, subject to an EU confidentiality obligation with the additional pressure of having to deal with multinational companies, it argued that it is inconsistent to refuse to grant in the legislation the same exemption to ODPC investigation and audit files (bear in mind that audits are carried out using statutory powers which require the disclosure of information which is inherently commercially sensitive and zealously guarded by the commercial entities concerned).

DPER Position

Both the Department and the ODPC acknowledge that the current DPER position accepts the fact that exemptions for investigation and audit files are available under the EU Directive as transposed into national law. Indeed, Section 41. (1) was introduced at Committee Stage to strengthen this recognition. However, such exemptions must first be applied by the ODPC and are then subject to appeal to the Information Commissioner under the draft FOI legislation. This is likely to involve the ODPC in the expenditure of considerable scarce resources to little purpose in order to claim an exemption under FOI legislation which is already available under EU law. It is far more desirable to specifically exempt in the FOI legislation all investigation, audit and advice files from disclosure by including such activities in Schedule 1, Part 1, as is the case with other Ombudsman type bodies and the Central Bank.

3. The obligation of professional secrecy placed on the ODPC by Article 28(7) of the Data Protection Directive 95/46/EC

Article 28(7) of the Data Protection Directive (95/46/EC) provides that:

“Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.”

This is transposed into national law via section 10(1) of the Second Schedule of the Data Protection Acts 1988 and 2003:

“A person who holds or held the office of Commissioner or who is or was a member of the staff of the Commissioner shall not disclose to a person other than the Commissioner or such a member any information that is obtained by him or her in his capacity as Commissioner or such a member that could reasonably be regarded as confidential without the consent of the person to whom it relates.”

Scope of the professional secrecy provision

The scope of this professional secrecy provision clearly applies to all confidential information to which the Commissioner or his employees have access during and after their employment. It therefore would apply to all complaints files, investigations, audits and to any compliance advice given and received in confidence.

Difficulties with the adequacy of the amended section 41(1)(a) to protect professional secrecy

The amended provision provides as follows:

“ 41. (1) A head shall refuse to grant an FOI request if –

(a) the disclosure of the record concerned is prohibited by law of the European Union or any enactment (other than a provision specified in *column (3) of Parts 1 or 2 of Schedule 3* of an enactment specified in that Schedule).”

A major difficulty with this provision is that it still leaves the confidentiality obligation which flows from EU law to be open to interpretation by the Information Commissioner on appeal. It would be open to the Information Commissioner to assess, on appeal, whether or not the record concerned could “reasonably be regarded as confidential.”

It is argued that (a) it is not a desirable from a public policy perspective to create such a potential (and arguably "inevitable") conflict between two public bodies and (b) that there is no provision in the relevant EU Directive which permits a national body to override the decision of the Data Protection Commissioner as to which of his papers contain confidential information and which do not [see also 5 below].

The above point is particularly relevant as the ODPC is effectively the European Ombudsman for many complaints as already set out. Given that there is a clear divergence of views between certain EU countries about the management and use of "big" data by multi-national entities, the Department would argue that enacting the legislation in current form is likely to give rise to severe difficulties for the ODPC and force that office to manage its operations in a manner entirely inimical to Ireland's open way of doing business.

4. The evolving status of data protection in the EU legal order

Article 16 (see **Appendix B**) of the Treaty on the Functioning of the European Union gives Treaty status to the right to protection of personal data, and provides that rules shall be laid down regarding the protection of individuals regarding the processing of personal data, and that compliance with such rules "shall be subject to the control of independent authorities." (extract appended at B). Data Protection is also given the status of a separate fundamental right in Article 8 of the EU Charter of Fundamental Rights, on the same lines.

Therefore, the role of the ODPC, as an independent authority to protect the fundamental right to data protection, stems directly from the Treaty of Lisbon. If a decision of an office holder under EU law (the Data Protection Commissioner) were to be challenged by a national Office holder (the Information Commissioner) this would lead to an inevitable and undesirable conflict of legal orders.

It should also be noted that the EU secondary legislation regarding data protection is being revised by means of a proposal for a Regulation, which will have direct effect in all Member States. This is likely to deliver further clarity in respect of the legal position and prerogatives of the Data Protection Commissioner being derived from European law. The new EU Regulation will also require legislative change in existing Irish law.

It is strongly preferable, in the view of the Department of Justice and Equality, to await the passage of that Regulation so as to consider in the fullest possible context the public policy issues which arise for Ireland in the context of balancing any right of access to personal data held by public bodies, including the ODPC, with the right to the protection of personal data. This would also allow Ireland to take account of developments in other EU states. Given that Irish legislation will require amendment in any event this would seem the ideal opportunity to consider these issues in the round with the benefit of having new EU legislation as the base. The Department of Justice and Equality would undertake in that regard to consult in detail with the Department of Public Expenditure and Reform with a view to arriving at the best policy options in the context of drafting amending legislation.

5. The inevitability of conflicts between the Data Protection Commissioner and the Information Commissioner regarding the confidentiality of our complaints, investigative, audit and advisory files

Under the current Bill there is an appeal route to the Information Commissioner from a refusal of a request which relates, in the view of the Data Protection Commissioner to data protected from disclosure under the EU Directive. It is the strong view of the Department that this mechanism will lead to inevitable and pointless conflict between the two Offices, a waste of public resources and to public disrepute.

In practice, due to obligations stemming directly from EU law, the Data Protection Commissioner would be obliged to argue the maximum confidentiality for his confidential records. The Information Commissioner, from the viewpoint of his statutory duty, would almost certainly be obliged to question this. This would lead to pointless conflict, as the Data Protection Commissioner would be obliged to argue the strength of his EU professional secrecy obligation, up to and including the CJEU. This could lead to a potentially very embarrassing situation, where two national office holders, both charged with upholding citizens' rights, would be seen to be arguing against each other in the public EU arena. The Department would strongly argue that this conflict is entirely unnecessary and is not in the national interest.

6. The need for the Office of the Data Protection Commissioner to provide a guarantee of absolute confidentiality to the multinational companies based in Ireland in the course of carrying out our data protection functions in relation to these companies, including audit and provision of compliance advice.

It is necessary for the ODPC to be in a position to give a guarantee of confidentiality to the companies to enable a full and frank exchange in the provision of advice and resolving issues found through audits. If the ODPC are in a position to offer a guarantee of confidentiality, it will be possible for the companies to come to them for advice on compliance issues, as is current practice, which the ODPC may be able to resolve in discussions with them, before a problem escalates to a level requiring the use of enforcement powers. If the ODPC cannot give this guarantee of confidentiality, exchanges will become much more formalised, the multinationals will seek protection behind their legal advisors, and the relationships will be much less productive and more litigious. The lack of a block exemption for investigative, audit and advisory files could impact on the guarantee of confidentiality that the Office needs to be able to give to multinational companies (Facebook, LinkedIn etc), when carrying out audits and investigations.

Without a block exemption for these files, it is not possible for the Data Protection Commissioner to give a guarantee of confidentiality to the multinational companies, because the existing Bill requires a record-by-record defence that the document can "reasonably be regarded as confidential". The ODPC will therefore have to warn multinational companies in all communications that they cannot guarantee the confidentiality of exchanges given that his decisions are appealable to the Information Commissioner who may take a different view.

The draft EU general data protection Regulation provides for a "one stop shop" mechanism, whereby, if a multinational is established in one Member State, the multinational is directly supervised by the data protection authority in that Member State, in consultation with the other Data Protection Authorities via a consistency mechanism. Supervision of these multinationals by the ODPC will be under EU-wide scrutiny, even more so than at present. It would obviously be very embarrassing and

damaging for public bodies in Ireland to be publicly airing constant domestic arguments about the application of a professional secrecy obligation which applies to all the European data protection authorities.

A further concern of the Department and the ODPC is the public policy implications of extending FOI legislation to the ODPC as currently proposed. The ODPC has a Europe-wide obligation to oversee the activities of multinational companies who locate their European headquarters in Ireland. It has extensive powers to compel the production of information from private entities, much of which data is commercially sensitive. Freedom of Information legislation is not applicable to private entities or numerous commercial State sponsored bodies (see Schedule 1, Part 2 "Exempt Agencies"). Yet it is being proposed to apply FOI legislation to the ODPC which holds extensive data from private and commercial bodies which would not be normally available for disclosure under FOI legislation as these bodies are not, for sound reasons of public policy, covered by FOI legislation. Indeed, in most cases the information held by the ODPC has been provided to that body under compulsion of law and not in the course of normal commercial activity or engagement. It is our view that the implications of such a wholesale extension of FOI to data from private sector bodies needs to be carefully considered, especially in the context of the draft EU Regulation under consideration.

7. Conclusions and Recommendations

In conclusion Department and the ODPC are of the view that:

- (i) The ODPC is a clearly and unambiguously an Ombudsman type body which acts in the same manner as other Ombudsman type bodies. Indeed, it might be argued that the Ombudsman role of the DPC is of a higher level than other Irish Ombudsmen due to his responsibilities to citizens across the EU. The Department and ODPC would therefore strongly argue that it is not consistent from a policy perspective to refuse to grant the same exemption to the ODPC in respect of their investigation, audit and advice files.
- (ii) Requiring the ODPC to apply FOI legislation in order to claim exemptions for investigation and audit files will more than likely lead to an interference with ongoing investigations and audits by FOI applicants and may set at naught the intentions of Section 5(1)(gg) of the Data Protection Act 1988 (as inserted by section 6 of the Data Protection (Amendment) Act 2003).
- (iii) Requiring the ODPC to operate the FOI legislation in order to claim exemptions available to them under EU law is not a sensible use of scarce public resources at a time when the ODPC is under severe pressure due to the establishment of Europe headquarters in Ireland by numerous multi-national corporations which requires that the ODPC effectively operate as the European Ombudsman for all complaints and hence investigations for those bodies.

The Department and the ODPC strongly recommend that the current legislation specifically provide in Schedule 1, Part 1, for the exclusion of the investigation, audit and advice files of the ODPC from the ambit of the draft FOI legislation. This would not do violence to Section 41(1) which could remain unchanged. As DPER already agrees that these files are protected from disclosure under current EU law this inclusion avoids:

- (i) The expenditure of scarce administrative resources on applying FOI to files which should not be disclosed in any event under the EU Directive. This may even necessitate additional resources for the ODPC to meet these requirements. It might be noted that the Minister for Justice and Equality has given a public commitment that the Government will ensure that ODPC will have all necessary resources to fulfil its mandate.

- (ii) The creation of unnecessary concern amongst commercial entities who fear that their personal data may be disclosed under the new FOI regime and the consequential resort to a more legalistic approach from those entities.
- (iii) A possible clash of national and EU legal orders as between two public bodies which is not in the national or EU interest.
- (iv) The premature determination of public policy in this area in advance of the passage of the new Regulation on data protection which will have direct effect in all Member States. The passage of this Regulation is likely to ensure that the legal position and prerogatives of the Data Protection Commissioner as derived from European law are even more clear. It will also require legislative change in existing Irish law. It is strongly preferable in the view of the Department of Justice and Equality to await the passage of that Regulation and to consider at that point the public policy issues which arise in the context of balancing any right of access to personal data held by public bodies, including the ODPC, with the right to the protection of personal data.

Department of Justice and Equality
26th February 2014

Appendix A

Section 10(1)(b) Data Protection Acts 1998 and 2003:

(b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the Commissioner shall –

- (i) Investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious, and
- (ii) If he or she is unable to arrange, within a reasonable time, for the amicable resolution by the parties concerned of the matter the subject of the complaint, notify in writing the individual who made the complaint of his or her decision in relation to it and that the individual may, if aggrieved by the decision, appeal against it to the Court under section 26 of this Act within 21 days from the receipt by him or her of the notification.

“Article 16 of the Treaty on the Functioning of the European Union

Article 16

1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.”